

## **CASE FACTS:**

The Fish and Wildlife Service (FWS) listed the Sonoran pronghorn as endangered under the Endangered Species Act (ESA). Current estimates indicate that less than 100 pronghorn exist in the United States today.

Pronghorn live in the unique desert habitat occurring in Southwest Arizona. Specifically they inhabit federal lands including the United States Air Force's (USAF) Barry M. Goldwater Range (BMGR), the United States Marine Corps' (USMC) Cabeza Prieta National Wildlife Refuge (CPNWF), the National Park Service's (NPS) Organ Pipe Cactus National Monument (OPCNM), and the Bureau of Land Management's (BLM) grazing allotments.

For differing reasons all of these agencies drafted environmental impact statements (EISs), which addressed their proposed actions' impacts on the Sonoran pronghorn. Specifically the agencies drafted the following EISs: USAF Legislative Renewal; USMC Training Range Complex; NPS General Management Plan; and BLM Resources Management Plan.

## **PROCEDURAL FACTS:**

The Defenders of Wildlife sued the USAF, USMC, NPS, BLM, and the INS in the District of Columbia's federal district court.

The environmental group alleged that the federal agencies' EISs failed to adequately address the cumulative impacts of all actions that affect the pronghorn. The government argued that it is not required to address impacts that are neither related to nor dependent on the proposed action in the EIS.

The court held that the USAF and the BLM adequately analyzed the cumulative effects of all the

agencies' actions on pronghorn. Conversely, the court held that the USMC and the NPS failed.

The court granted the government's motion for summary judgment for the claims against the USAF and the BLM. However, the court required the USMC and the NPS to reconsider the cumulative impacts of their actions on the pronghorn.

## **CASE HOLDING:**

When drafting an EIS, an agency must consider direct, indirect, and cumulative impacts on the affected environment. Cumulative impact means the impact resulting from an action's incremental impact when added to other past, present, and reasonably foreseeable actions regardless of which agencies undertake the actions. Cumulative impacts can be independently minor but collectively significant actions that occur over time.

A reviewing court will ensure that an agency took a "hard look" at environmental consequences of the actions. However, the court will not substitute its own decision for an agency's decision.

### *USAF*

In the cumulative impacts discussion, the USAF's EIS notes the following agencies' activities on the pronghorn: United States Border Patrol; USMC; BLM; and NPS. USAF discusses these agencies' activities' impacts on biological resources, wildlife, and the pronghorn. While the court felt that the USAF could have made the analysis more comprehensive, it believed that the agency had taken a hard look at the environmental consequences.

### *BLM*

The BLM's Resources Management Plan/EIS concluded that its proposed rangeland action would lead to a long-term positive impact on the pronghorn's habitat and would not affect the

pronghorn. BLM did not draft a cumulative effect section and did not address other agency actions. However, the court found that because the agency's action would benefit the pronghorn it did not create incremental adverse impacts necessitating discussion of other agencies' actions.

### *USMC*

In its EIS's cumulative impacts section, USMC stated that impact on the environment may occur from the following activities: military operations; recreational use; wildlife management; and border monitoring. In addition the USAF stated that its proposed action when considered with the civilian aircraft use may increase the impact of vehicular, aircraft, and ground impacting noise on the pronghorn specifically. The EIS also stated that vehicular traffic could disturb the pronghorn and their habitats.

The reviewing court found that the USMC's EIS did not analyze the nature and the extent of the impact on the pronghorn. Because the USMC only made conclusory remarks that could not aid a person in making an informed decision the court required the USMC to reconsider its action's effects on the pronghorn.

### *NPS*

NPS's GMP stated that its proposed action would result in negligible loss of wildlife habitat since humans had already intruded in the area. In addition NPS stated that regardless of its habitat protection highway vehicles would continue to kill wildlife possibly including pronghorn, thus, potentially reducing their genetic variability and reproductive fitness.

The court found that the NPS did not analyze the incremental impact highway traffic's effect on the pronghorn. Thus, the court found that NPS'

cumulative analysis remained insufficient to meet NEPA regulations.

The NPS was only found deficient under NEPA and then only for insufficient cumulative impacts analysis. The NPS was upheld in all claims involving the Endangered Species Act, and the Administrative Procedures Act.

#### **LESSONS LEARNED:**

When drafting an EIS, NPS must consider direct, indirect, and cumulative impacts of its actions on the action area. The cumulative impacts take a “hard look” at the NPS’s adverse incremental impacts to the resource when added to other past, present, and reasonably foreseeable actions that also affect that resource. The other past, present, and reasonably foreseeable actions include actions of all agencies that affect the resource and the action area.

To help NPS survive a legal challenge to its EIS’s cumulative impacts section, NPS should discuss any resource concerns that remain common to both NPS and to the other agencies. Moreover, NPS should identify resource concerns that are not common to all agencies but may have a cumulative impact on one of the agencies’ actions.

Instead of making conclusory statements concerning impacts, NPS’s EIS must analyze the nature and extent of the activities on the resource in such a manner as to equip a decisionmaker with alternative courses of action.

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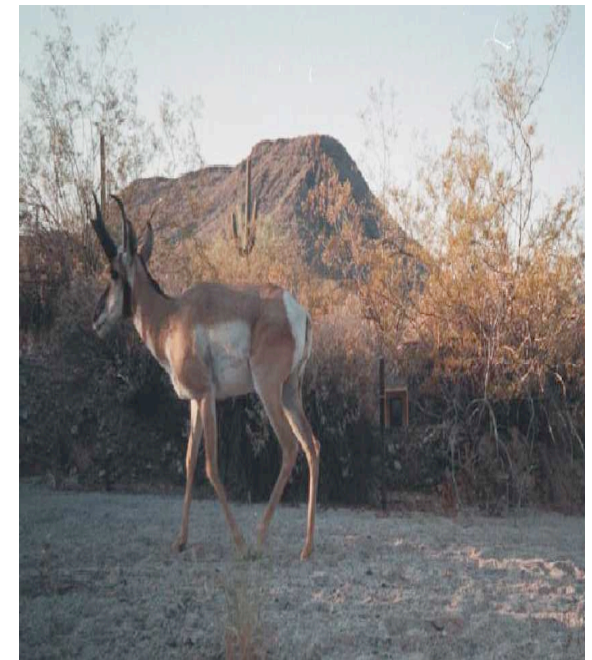
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## **DEFENDERS OF WILDLIFE V. BABBITT**

**CV No. 99-927 (D.D.C. 2001).**



***LESSONS LEARNED: NPS MUST  
CONSIDER OTHER AGENCIES'  
PAST, PRESENT, AND FUTURE  
ACTIONS IN ITS CUMULATIVE  
IMPACTS DISCUSSION***